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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MARTINEZ CASTILLO,

Defendant and Appellant.

F057124

(Super. Ct. No. VCF190463B)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant David Martinez Castillo appeals a judgment following his conviction of four counts of attempted murder (Pen. Code,¹ §§ 664, 187, subd. (a); counts 1-4) and one count of shooting at an inhabited dwelling (§ 246; count 5). He complains the trial court erroneously denied the *Wheeler/Batson*² motion brought by his brother and codefendant, Adan Martinez Castillo (Adan), during jury selection. We affirm.

DISCUSSION³

Defendant contends the trial court erroneously denied Adan's *Wheeler/Batson* motion because comparative juror analysis reveals the prosecutor's race-neutral reasons for excusing five Hispanic prospective jurors and one African-American prospective juror were pretextual. Assuming without deciding defendant's claim was not forfeited by his failure to join in Adan's motion below, we reject it on the merits.

The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277), as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution (*Batson*, *supra*, 476 U.S. at p. 89; *People v. Burgener* (2003) 29 Cal.4th 833, 863 (*Burgener*)). "A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing that one or more jurors [have] been excluded on the basis of group or racial identity.... Once a prima facie showing has been made, the prosecutor then must carry the burden of showing that he or she had genuine nondiscriminatory reasons for the challenges at issue. [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 993.) At that point, the trial court

¹ Further statutory references are to the Penal Code unless otherwise specified.

² *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

³ The facts concerning the underlying crimes are irrelevant to this appeal.

must decide whether the opponent of the challenge has proved purposeful discrimination. (*People v. McDermott* (2002) 28 Cal.4th 946, 971 (*McDermott*).)

The trial court's ruling on this issue is reviewed for substantial evidence and with great restraint. (*McDermott, supra*, 28 Cal.4th at p. 971.) "We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*Burgener, supra*, 29 Cal.4th at p. 864.) In carrying out this obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's nondiscriminatory reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's nondiscriminatory reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom. (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.)

At the end of the first day of jury selection in this case, defense counsel made a *Wheeler/Batson* motion on the ground the prosecutor improperly used three of six peremptory challenges to exclude Hispanic prospective jurors. After finding a prima facie showing of discrimination had been made, the trial court invited the prosecutor to state his reasons for excluding these prospective jurors. The prosecutor explained he excused Prospective Juror No. 4⁴ because she had no prior jury experience and because she said her brother had recently been released from jail for a gang-related crime. Prospective Juror No. 2 was excused because he said his father and cousin were in jail. Prospective Juror No. 8 was excused because he said he had friends who had been

⁴ For the sake of convenience and privacy, we refer to the excused jurors by their seat numbers.

arrested for attempted murder. After listening to the prosecutor's reasons, the trial court denied the *Wheeler/Batson* motion, finding "the prosecutor has race-neutral reasons for excluding those particular jurors."

On the second and final day of jury selection, after the prosecutor used eight more peremptory challenges to exclude prospective jurors, defense counsel brought a second *Wheeler/Batson* motion on the ground the prosecutor improperly used two peremptory challenges to exclude Hispanic jurors and one peremptory challenge to exclude an African-American juror. The trial court again found a prima facie showing had been made and asked the prosecutor to explain his reasons for excusing the jurors. The prosecutor explained he excused first Prospective Juror No. 14 because he said he had two brothers who had served prison terms. In response, the trial court stated: "Yeah, that was real clear to the Court that that wasn't based on race. The fact that he had two brothers that were involved in gangs, clearly any prosecutor wouldn't leave them on." As to Prospective Juror No. 1, the prosecutor explained: "[S]he said her dad was arrested. I feel her experience with her father and -- well, the experience of her father and with the police might prejudice her with our witnesses." The court replied: "Yeah, I find a race-neutral reason to exclude her, also." As to the second Prospective Juror No. 14 excused, the prosecutor explained he excused the African-American juror because "she said she works for a group home, and she also has family -- I believe she said her family shot at people. I feel that might prejudice our case."⁵ The trial court then noted she had been arrested and the prosecutor acknowledged this was another reason he had excused her. The trial court concluded: "Again, I don't think there's any prosecutor that's going to

⁵ Specifically, second Prospective Juror No. 14 stated that she and her husband ran a "state parole group home," she had arrests in Tulare and Fresno Counties but "[e]verything has now been dismissed," and over 30 years ago she had distant cousins who were involved in a gang and shot and killed victims.

leave her on the jury panel, either, because of that background. So I find there is a race-neutral reason to exclude her.”

On this record, we cannot agree with defendant’s description of the trial court as “summarily” or “perfunctorily” denying the *Wheeler/Batson* motion. Rather, the trial court’s comments indicate it made a sincere and reasoned effort to evaluate the prosecutor’s nondiscriminatory reasons for excusing the prospective jurors in question. Although not required to do so, the trial court made a number of *specific* comments detailing *facts* supporting the prosecutor’s justifications and the trial court’s findings that they were race neutral.

Defendant’s invocation of comparative juror analysis also fails to demonstrate the prosecutor’s nondiscriminatory reasons for excusing the jurors were pretextual. Despite asserted similarities, a number of the sworn jurors defendant discusses also had characteristics the prosecutor could have reasonably viewed as potentially favoring the prosecution. For example, although sworn Juror No. 904128 said she had a brother who had been arrested, she also said she had a son-in-law who was a police officer and a niece who worked as a courtroom clerk in the same courthouse where defendants were being tried. In addition, she had watched her niece on television reading jury verdicts.

Juror No. 801205, a self-employed farmer, who disclosed that he had a family member involved in a similar criminal trial, expressed negative views of gang members, which likewise could have been construed as favorable to the prosecution. At one point, Juror No. 801205 stated: “Well, I don’t like gangs and I don’t like what they stand for. Like I said, I’m self-employed. If they worked for me, they wouldn’t have enough time to go do drive-by’s.” Later, when asked about whether he might have a problem judging someone, Juror No. 801205 stated: “I don’t necessarily, you know, judge people, but, I mean, there’s that little thing that goes behind your head when you see somebody with tattoos or earrings or anything else.”

We have carefully reviewed the other comparisons urged by defendant and find none necessarily demonstrates purposeful discrimination by the prosecutor. We find, and defendant does not dispute, that the record contains substantial evidence supporting the prosecutor's nondiscriminatory reasons for excusing the prospective jurors in question. Accordingly, we reject defendant's challenge to the trial court's ruling on his brother Adan's *Wheeler/Batson* motion.

Finally, we decline to consider the challenge to the gang enhancements raised by Adan in his separate appeal (*People v. Castillo*, appeal No. F057335)⁶ as applicable to defendant. Pursuant to California Rules of Court, rule 8.200(a)(5), defendant asserts that he joins in "the issues and arguments" raised by Adan "to the extent that they are applicable to his case and accrue to his benefit." Although Adan does argue in his appeal that the evidence was insufficient to support the gang enhancements attached to each count, his argument specifically addresses the evidence pertaining to him and does not apply to defendant or accrue to defendant's benefit. Indeed, one of Adan's arguments is that imposition of the gang enhancements unfairly punished him for associating with *defendant*, his active gang-member brother.

We are not required to make an independent, unassisted study of the record to determine whether the evidence was sufficient to support the gang enhancements as to defendant. Under California law, it is the duty of counsel to refer the reviewing court to the portion of the record that supports the appellant's contentions on appeal. If no citation is furnished on a particular point, the reviewing court may treat it as waived. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) Applying these principles here, we find defendant has waived any challenge to the gang enhancements imposed against him.

⁶ We take judicial notice of the opening brief in that appeal. (Evid. Code, §§ 452, subd. (d), 459.)

DISPOSITION

The judgment is affirmed.

HILL, J.

WE CONCUR:

WISEMAN, Acting P.J.

KANE, J.